POTENTIAL IMPACTS OF THE PROPOSED AMENDMENT TO THE CERCLA WAIVER OF SOVEREIGN IMMUNITY

Report to Congress

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C O N T E N T S

EXECUTIVE SUMMARY

Basis for the Report

In the 105th Congress, S. 8, the Superfund Cleanup Acceleration Act of 1998 was introduced into the Senate. During the legislative debate an amendment was introduced regarding the waiver of sovereign immunity in the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), hereinafter referred to as the "S. 8 amendment."[1] On March 26, 1998, the Senate Committee on Environment and Public Works voted in favor of the S. 8 amendment, which would amend the existing CERCLA waiver of sovereign immunity.

On May 5, 1998, the Department of Defense and the Environmental Protection Agency (EPA) wrote a letter to Senator John Chafee (R-RI), Chairman of the Senate Environment and Public Works Committee, a copy of which was provided to the Senate Armed Services Committee, stating that the Administration could not support the S. 8 amendment.[2]

> After more than a decade of effort and a nearly $17 billion investment, the Department of Defense has achieved response complete at 15,265 of the 27,454 contaminated sites identified by the Department. We cannot support legislative provisions that could undermine this significant progress.

In Senate Report 105-189, which accompanied the National Defense Authorization Act for Fiscal Year 1999, the Senate Armed Services Committee requested the Departments of Defense and Energy, in consultation with EPA, to submit this report by September 30, 1998.[3]

The Committee requested that the report "should specifically address (1) any additional costs that might be incurred by the taxpayers as a result of the proposed amendment; and (2) any impact that the amendment may have on the cleanup of the Department of Defense and the Department of Energy sites pursuant to agreements … entered into with the Environmental Protection Agency and with state and local governments." On September 29, 1998, the Departments notified the Committee by letter that they needed additional time to prepare the report and to provide for appropriate coordination within the Administration.[4]

Synopsis of the S. 8 Amendment

The S. 8 amendment (section 603 of S. 8) consists of two distinct parts. First, it would amend the existing CERCLA waiver of sovereign immunity to require the Federal government "to comply with this Act and all other Federal, State, interstate, and local" requirements (section 120(a)(1)(B)(i)) to the same extent and in the same manner as private parties. It would provide that those requirements include permit requirements, injunctive relief, and civil penalties. Second, the S. 8 amendment creates a new subsection, section 120(e)(7), which would address

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1 *Refer to Attachment A for the S. 8 amendment.*

2 *Refer to Attachment B for the May 5, 1998, letter.*

3 *Refer to Attachment C for the Senate Armed Services Committee report language.*

4 *Refer to Attachment D for the September 29, 1998, letter.*

the enforceability of state and Federal requirements applicable to remedial actions at Federal facilities where an interagency agreement (IAG) is in place. It states that an IAG would not impair the authority of a state or other party to enforce state or Federal laws unless those requirements, without objection from the state, have been specifically addressed in the IAG or waived.

Results in Brief

The Departments of Defense and Energy are fully committed to cleaning up their facilities to protect public health and the environment. The Departments have established cleanup programs and entered into CERCLA IAGs with EPA (at NPL sites) and with states, leading to substantial progress in cleaning up contaminated sites. There are formal and informal mechanisms in place for involving states, EPA, and other parties in the cleanup process and decisions.

As noted in the September 29, 1998, letter to the Senate Armed Services Committee, the Federal agencies are subject to the same requirements as private parties under CERCLA and that the agencies remain committed to the cleanup of contaminated Federal facilities. Moreover, the existing waiver in CERCLA section 120(a) is working to ensure that the Federal agencies are treated the same under CERCLA as private parties and should not be altered.

Like similarly-situated private parties subject to CERCLA, the Departments follow the procedural requirements of CERCLA and comply with the substantive requirements of state and Federal environmental laws and regulations, as well as procedures set out in section 120. Moreover, the remedies they implement must protect human health and the environment. Furthermore, EPA and states can take enforcement actions against a Federal facility for failure to comply with provisions of these CERCLA requirements at NPL and non-NPL sites.

Although such a result was not intended, the Departments are concerned that parties dissatisfied with a cleanup process or remedy could argue that the S. 8 amendment requires Federal facilities to comply with additional permitting and procedural requirements, despite exemptions from such requirements in CERCLA section 121(e) applicable to all sites being addressed through CERCLA. Such parties could also argue that the S. 8 amendment allows state enforcement or citizen suits before the remedy is implemented, despite the pre-enforcement review bar to such challenges, established by CERCLA section 113(h).

Even though the S. 8 amendment is, in our view, not intended to alter existing generally applicable CERCLA provisions such as the permit exemption or the pre-enforcement review bar, the Departments are concerned that attempts by other parties to construe the S. 8 amendment more broadly would lead to nonproductive debates and litigation. While the Departments believe such attempts would ultimately fail, this would add time and costs to Federal cleanup programs that have matured over time and are successfully cleaning up sites. These attempts have the potential to alter the current balance of relationships among the parties involved in cleanup decisions, undermine the framework of existing IAGs, and subject Federal facilities to requirements and procedures that do not apply to private parties.

This report includes a discussion of the Departments' concerns about the S. 8 amendment and an analysis of potential cost impacts associated with it. Cost information, however, is limited. Because cost impacts are difficult to predict and depend on how other parties and courts interpret the S. 8 amendment, they are not presented definitively, but rather as assumptions based on possible interpretations of the S. 8 amendment.

The S. 8 amendment is not needed. If Congress believes some amendment to the existing CERCLA waiver is necessary, however, the Departments would like to work with the Congress to draft language that would minimize the potential for confusion and litigation, and that would adhere to the principle set forth by this Administration that Federal agencies should be treated the same as private parties.

INTRODUCTION

This report addresses the cleanup programs of the Departments of Defense and Energy and how the proposed amendment may affect these programs.[5] Currently, the Departments' programs are working and successfully meeting unique cleanup challenges across the nation. Under the existing programs each Department:

- follows and complies with all applicable Federal and state laws,
- involves states and communities in the remedy selection process,
- tracks and reports cleanup progress to Congress each year, and
- works closely with regulatory agencies and stakeholders.

The following discussion describes each Department's cleanup program.[6]

Defense Environmental Restoration Program (DERP)

From its roots in the Military Service and Defense Agency programs of the early 1970s, the DERP has evolved into a successful cleanup program. The program is well established and moving steadily toward the goal of cleaning up all contaminated sites. The Department of Defense developed a relative risk site evaluation framework to prioritize sites nationwide for cleanup. Through this framework, sites are placed into risk categories based on the potential threat to human health and the environment. The Department has established goals and performance measures based on this prioritization process to reach its final objective. The Department uses this process to prioritize cleanup and budgets on a nationwide basis.

The Department's environmental mission focuses on cleaning up contaminated sites at operational installations, closed installations, and formerly used defense sites. As shown in the fiscal year 1997 (FY97) DERP Annual Report to Congress, the Department is making significant progress toward completing its cleanup program. As of FY97, the Department had completed response actions or had cleanup remedies in operation at 15,265 (55 percent) of its 27,454 sites (which are located on 1,767 installations and 9,078 other properties). The Department has already invested $17 billion and estimates that the remaining cost of cleanup, excluding future program management costs, will be approximately $27 billion.

The Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) is the primary driver for the DERP. The Department involves regulators, states, communities, and other stakeholders in the cleanup process through interagency agreements (IAGs) with the U.S. Environmental Protection Agency (EPA) and states (at its National Priorities List [NPL]

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5 *This report applies only to facilities under the jurisdiction, custody, or control of the United States. Because some of the procedures of CERCLA section 120(e) at NPL sites, such as the requirements for an IAG and mandatory timetables and deadlines, do not apply at non-NPL Federal facility sites, this report may not fully reflect activities at such non-NPL sites.*

6 *To be consistent with other public documents, the discussions of the Departments' cleanup programs use slightly different terms. The Department of Defense uses the term "site" to mean a specific area where contaminants may have been spilled, disposed of, or abandoned at an installation. The Department of Energy uses the term "release site" which is equivalent to the Department of Defense's use of the term site. To refer to an entire facility, the Department of Defense uses the term "installation" and the Department of Energy uses the term "site."*

facilities); Defense and State Memorandums of Agreement (DSMOAs) with states; and a network of Restoration Advisory Boards (RABs), which involve regulatory agencies and local citizens. At all Defense facilities, EPA, state and local regulators, and the public are afforded the consultation and participation opportunities specified in CERCLA and DERP. This process is in place to ensure that remedies are risk-based, cost-effective, and protective of human health and the environment.

Through its nationwide DSMOA program, the Department obtains the services of the states to assist it in carrying out its cleanup responsibilities. State services provided under this program include document review, comments on proposed remedy selection, and assistance in determining the requirements of state law. The Department has entered into DSMOAs with 48 states and territories and provides approximately $29 million annually in support to those states. The Department has also entered into installation-specific IAGs or Federal Facility Agreements (FFAs) with EPA and states under CERCLA section 120(e) at Defense sites listed on the NPL. These agreements provide for regulator oversight of Defense's restoration process. By the end of FY97, the Department had signed 105 IAGs/FFAs. In 1997, it supported 278 RABs and issued regulations for Technical Assistance for Public Participation (TAPP) grants to support the RABs.

Department of Energy Cleanup Program

The Department of Energy's Environmental Management (EM) program is responsible for cleanup of the radioactive, chemical, and other hazardous waste and materials left from 50 years of U.S. nuclear weapons production and other activities. The Department estimates that it will cost $147 billion (in constant 1998 dollars) to complete cleanup and manage wastes at the 113 sites in the EM program. (See *Accelerating Cleanup: Path to Closure*, June 1998.) This estimate includes not only environmental restoration activities, but also management of high-level, transuranic and other wastes; deactivation and decontamination of excess facilities; and safe storage of excess nuclear materials and spent nuclear fuel. The Department has made significant progress in cleaning up its sites. It had completed cleanup at 60 EM sites by the end of FY97, and its goal is to complete cleanup of 103 EM sites by the year 2006.

The Department of Energy's environmental restoration program in EM, typically carried out under CERCLA, is responsible for cleanup of about 9,000 release sites, defined as a specific area at a larger geographic site where contaminants may have been spilled, disposed of, or abandoned. Cleanup of release sites includes cleanup of the contaminated soil, surface water and groundwater. The Department currently estimates that cleanup of 80 percent of the release sites will be completed by 2006.

The Department of Energy has established strong partnerships with states, EPA, and the community for setting site priorities and making cleanup decisions. The primary mechanism for regulating NPL sites is the CERCLA IAG, which establishes responsibilities, procedures, and enforcement mechanisms. The Department has 18 sites listed on the NPL and has IAGs in place at all but two of these sites, with negotiations under way at one of the remaining two sites. The state in which a site is located is a party to all but two of the IAGs in place.[7]

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7 *Refer to Attachment E for the status of IAGs at Department of Energy facilities on the National Priorities List.*

These IAGs play an important integrating role, resolving a complex problem that had plagued the program in its early days, namely, how to integrate the overlapping authorities and requirements in CERCLA and the Resource Conservation and Recovery Act (RCRA). The Department's current agreements explicitly provide this integration, mapping out a single, integrated approach for the site cleanup.

At non-NPL sites, the Department of Energy complies with state laws concerning removal and remedial action and with other Federal laws governing cleanup, consistent with the existing CERCLA waiver. Cleanup activities are generally being carried out under other non-CERCLA regulatory mechanisms that are comparable to CERCLA. For example, cleanup activities at the Princeton Plasma Physics Laboratory in New Jersey are carried out under state cleanup law, and cleanup activities at Los Alamos National Laboratory are regulated through a RCRA corrective action permit issued by New Mexico.

The Department of Energy, like the Department of Defense, provides substantial support to the states to ensure that the states have sufficient available resources to play a meaningful role in overseeing implementation of the cleanup. For example, in FY98, the Department paid more than $49 million to fund state oversight of cleanup activities, as well as review of plans, inspections, and regular attendance at key planning sessions and meetings held to secure public participation in projects.

OVERVIEW

The Current Waiver of Sovereign Immunity is Working

The Departments believe that their cleanup programs are working under the existing CERCLA waiver of sovereign immunity. The existing CERCLA waiver ensures that Federal facilities are treated in the same way that private parties in similar situations are treated under CERCLA, requiring that:

> Each department, agency, and instrumentality of the United States (including the executive, legislative, and judicial branches of government) *shall be subject to, and comply with, [CERCLA] in the same manner and to the same extent, both procedurally and substantively, as any nongovernmental entity, including liability*. (emphasis added) (CERCLA section 120(a)(1))

The existing CERCLA waiver goes on to specify that all guidelines, rules, regulations, and criteria developed under CERCLA are applicable to Federal facilities in the same manner that they apply to other facilities.

At non-NPL currently owned and operated Federal facilities, CERCLA also waives sovereign immunity from state cleanup laws:

> State laws concerning removal and remedial action, including State laws regarding enforcement, *shall apply to removal and remedial action at facilities owned or*

> *operated by a department, agency or instrumentality of the United States when such facilities are not on the National Priorities List.* The preceding sentence shall not apply to the extent a State law would apply any standard or requirement to such facilities which is more stringent than the standard and requirements applicable to facilities which are not owned by a department, agency, or instrumentality. (emphasis added) (CERCLA section 120(a)(4)).

Thus the existing CERCLA waiver ensures that Federal facilities are subject to the same requirements and processes that apply to private facilities conducting a cleanup under CERCLA. In addition, under the existing CERCLA waiver, Federal facilities are subject to substantive state standards. Like private party cleanups, cleanups at Federal facilities must meet applicable or relevant and appropriate requirements (ARARs) in state and Federal laws for on-site actions and must comply with all applicable laws for off-site actions.

Federal facility compliance with ARARs and the CERCLA process is enforceable. At NPL sites, the IAG is the primary mechanism for ensuring that Federal facility cleanups are enforceable. As in private party cleanups, EPA is the primary regulatory authority for cleanup decisions and for ensuring compliance with the terms of the IAG. IAGs provide for stipulated penalties for noncompliance with the IAG. IAGs are enforceable by injunctive relief and penalties in Federal Court by states and other citizens, pursuant to CERCLA section 310.

As required by CERCLA, states generally play a substantial role in CERCLA decisions, usually through IAGs at NPL sites and, in practice, are involved in all aspects of the cleanup process. The IAGs often integrate RCRA and CERCLA requirements, with the state acting as lead regulator for some of the cleanup actions within the IAG. States can and do fine Federal facilities for violations of such agreements, pursuant to their RCRA authority. For instance, the recently negotiated Rocky Flats Cleanup Agreement contains stipulated penalty provisions that can be applied by the state as well as EPA. As discussed previously, the Departments also provide funding to support states' participation in the Federal facility cleanups.

The Departments regularly involve regulators, states, communities, and other stakeholders in the cleanup process. They have developed strong partnerships with states and EPA, both through high-level planning and joint decision-making sessions for establishing site priorities and remedial directions, and through cooperative team meetings on individual projects. The Departments are implementing this approach to partnership in response to recommendations by the Federal Facilities Environmental Restoration Dialogue Committee (FFERDC), a Federal Advisory Committee established by EPA to address Federal facility cleanups, especially at Defense and Energy installations.

The Effect of the New Waiver of Sovereign Immunity Is Unclear — Section 120(a)

The S. 8 amendment provides that Federal facilities are subject to, and must comply with, CERCLA and all other Federal, state, interstate, and local requirements to the same extent and in the same manner as private parties. The waiver portion of the S. 8 amendment indicates that such requirements include permit requirements, reporting requirements, injunctive relief, and

civil penalties. The provision also addresses civil and criminal liability for Federal agencies and Federal employees, respectively.

Consistent with the Administration position, the Departments believe that Federal agencies should be subject to the same laws, requirements, and processes as similarly situated private parties. The Departments also believe that the S. 8 waiver is not necessarily intended to create new requirements or authorities. However, because the existing CERCLA waiver in section 120(a)(1) already treats Federal facilities the same as private facilities under CERCLA, the Departments are concerned that, as currently drafted, other parties could assert that the S. 8 waiver changes permit requirements and other authorities that apply to Federal facility cleanups, therefore treating them differently from private parties.

The S. 8 waiver, as currently drafted, could lead other parties to reopen fundamental questions about what procedural and substantive requirements apply, even as numerous cleanups are under way and progress is being made. The potential for confusion arises because the S. 8 waiver lists a number of procedural requirements, such as permit requirements, as falling within the scope of the waiver. As noted above, however, CERCLA and its implementing regulations specifically exempt on-site removal and remedial actions from the requirement of obtaining permits and from other procedural requirements. CERCLA requires that cleanups — both private party and Federal — meet the substantive requirements of other Federal and state environmental laws, which are identified and applied through the CERCLA process, but it exempts all parties from many purely procedural requirements of other state and Federal laws.

The Senate report accompanying S. 8 states that the S.8 amendment is modeled after the Federal Facility Compliance Act of 1992 (FFCA).[8] The FFCA amended the RCRA waiver of sovereign immunity by specifically waiving immunity from fines and penalties and from administrative enforcement. Similar language waiving sovereign immunity has been adopted in other environmental statutes, such as the Safe Drinking Water Act (SDWA). Generally implemented by the states, these laws are largely permit-driven, that is, their standards are applied and enforced through permits, and Federal agencies, like private parties, must obtain, and comply fully with, the applicable permits and all other procedural and substantive requirements.

CERCLA, however, establishes a comprehensive process for implementing cleanup and ensuring that substantive standards established under other laws are met, rather than requiring strict compliance with procedures mandated by other laws. This divergence was not accidental. Intending to expedite risk-based and cost-effective cleanups, Congress took specific actions to facilitate cleanups and to avoid duplication and disruption of the process. For example, in CERCLA section 121(e), CERCLA exempts on-site actions from the requirement of obtaining permits and, under CERCLA section 113(h), limits judicial challenges to the cleanup process until the cleanup is implemented. These provisions apply to cleanup actions at NPL sites, which are generally implemented through IAGs, and to cleanups at non-NPL sites.

By specifically referencing additional requirements for Federal agencies that would not otherwise apply to CERCLA cleanup, the S. 8 waiver invites debate about whether it changes application

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8 *Refer to Attachment F for an excerpt of the Senate report accompanying S. 8 (S. Report No. 105-192 (1998))*

of the CERCLA process to Federal facilities. Such an extensive revision of the existing CERCLA waiver could lead parties that are dissatisfied with a particular remedy to argue that Congress intended to change the requirements and authorities that apply to Federal facility cleanups.

As a consequence, the S. 8 waiver could result in other parties urging additional requirements on Federal agencies that would not be required of private parties undertaking cleanup under CERCLA, including procedural requirements of other laws that contribute little to achieving a protective remedy. This could undercut the framework established by CERCLA, which is intended to facilitate response actions. This could also foster time-consuming disputes and litigation.

A unique concern for the Department of Defense is the S. 8 waiver's possible impact on its relative risk priority process, which prioritizes cleanups nationwide. This process, which includes consideration of input from regulators and stakeholders, allows Defense to efficiently use its congressionally appropriated budget. The S. 8 waiver has the potential to be read to allow each state or locality to determine, on a unilateral basis, cleanup remedies and schedules at Federal facilities. Because there is a larger backlog of cleanup actions than Defense has the appropriations and other resources to undertake at once, providing authority to states to dictate the pace and timing of cleanups could severely impact its nationally prioritized, planned, and managed program.

The New Section 120(e)(7) Would Treat Federal Facilities Differently

The new section 120(e)(7) of the S. 8 amendment addresses the enforceability of Federal and state requirements at Federal facilities that are governed by CERCLA IAGs. It states that an IAG does not impair the authority of a state or other party to enforce state or Federal laws unless those requirements, without objection from the state, have been specifically addressed in the IAG or waived.

Under the current CERCLA process, cleanup actions are required to comply with all ARARs in state and Federal law, unless the ARAR has been waived. ARARs are identified through the CERCLA process, and the ARARs determination is captured in the Record of Decision (ROD) and incorporated by reference into the IAGs. CERCLA section 121(f) allows states to challenge the waiver of a state ARAR.

Although specific requirements are not generally addressed in the IAG itself, the Departments believe that identification of ARARs through the CERCLA process, as established by the IAG, would fulfill the condition that requirements be "specifically addressed in the agreement." Because states are fully involved in ARARs decisions, the S. 8 amendment would not allow enforcement actions and suits that are now barred under CERCLA section 113(h).

The Departments are concerned, however, that the proposed section 120(e)(7) could be read to treat Federal facilities differently from private sites in determining whether citizen or state challenges are allowable at an ongoing CERCLA cleanup, contrary to Congress' intent that Federal facilities and private parties be treated the same. Such suits would be barred at non-

Federal sites under CERCLA section 113(h) until the cleanup action is done, if "the court's intervention would impact implementation of the response action." [9] Retaining the section 113(h) bar is critical to prevent cleanup delays. Others may argue that section 120(e)(7) means that, at Federal facilities, the requirement that the suit sought to enforce also has to be "specifically addressed in the agreement" in order to maintain the bar, or that the bar does not apply if a state objects to how the requirement is applied to the remedy. Although the Departments believe that such requirements would be addressed under the current structure of the IAGs and the ARARs process in which states participate, the Departments are concerned that other parties may argue a different interpretation of the proposed section 120(e)(7) provision.

The Departments are also concerned with how other parties might treat new requirements that are promulgated after the IAG and ARARs documents are completed. Under the CERCLA process, EPA evaluates whether a selected remedy should be revised to accommodate a new requirement, based on whether the remedy is still protective. States or other parties, however, could argue that the proposed section 120(e)(7) provides for strict enforcement of new requirements. This, again, would be a different standard than applies to private parties.

The net result from the proposed section 120(e)(7) could be an attempt by litigants to narrow the application of CERCLA section 113(h) — intended to restrict lawsuits in order to prevent cleanup delays — to Federal facility cleanups, and an increase in disputes and litigation as the limits of the provision are tested. Furthermore, the provision could undermine the carefully negotiated framework surrounding existing IAGs and potentially diminish their central role in the cleanup process.

IMPACTS OF THE S. 8 AMENDMENT ON THE DEPARTMENTS

The following discussion describes specific areas of concern regarding potential interpretations of the S. 8 amendment. It also analyzes the potential impacts of such misinterpretations on the Departments' cleanup programs.

Interagency Agreements — Section 120(e)(7)

As required by CERCLA, IAGs at Federal facilities on the NPL have proved to be an invaluable tool for delineating responsibilities and integrating legal authorities among the Departments, EPA, and the states. States are encouraged to become parties to IAGs as a way of broadening regulatory involvement in the cleanups and assisting in applying state ARARs to site cleanups. During the IAG negotiation process, fundamental issues are addressed, such as the most effective way of integrating RCRA and CERCLA requirements. This process ensures that the objectives of all parties are met in a manner consistent with CERCLA's goal of achieving expedited cleanups.

IAGs normally provide a significant role for states in the CERCLA remedial decision-making process at NPL facilities. In some cases, the state is the lead regulator for cleanup actions. IAGs establish carefully balanced and predictable processes that allow all parties to participate in

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9 *Heart of America Northwest, et al., v. Westinghouse Hanford Company, et al., 820 F. Supp. 1265, 1277, (D. Wash (1993)).*

decisions, including selecting the remedy, determining the state and Federal requirements that must be met, setting the schedule for completion of each remedial action, and making arrangements for long-term operation and maintenance of the site. IAGs also contain penalty provisions for noncompliance with IAG schedule deadlines.

Therefore, the Departments believe it is critical to preserve the existing IAGs, which provide the framework for their cleanup process. The drafters of S. 8 in the 105th Congress recognized the need to avoid disrupting existing IAGs. Section 601 of S. 8, "Federal Entities and Facilities," clearly would protect these agreements and the current IAG process if CERCLA authority is transferred to the state:

> Effect on Interagency Agreements—Nothing in this subsection shall require, authorize, or permit the modification or revision of an interagency agreement covering a facility with respect to which authorities have been transferred to a State under a transfer agreement (except for the substitution of the transferee State for the Administrator in the terms of the interagency agreement, including terms stating obligations intended to preserve the confidentiality of information) without the written consent of the Governor of the State and the head of the department, agency, or instrumentality.

On the other hand, it is possible to interpret the proposed section 120(e)(7) of the S. 8 amendment in a way that undermines existing agreements and diminishes the central role of the IAG as the governing framework for the cleanup. Disagreements could arise as to whether a requirement was "specifically addressed in the agreement," and therefore protected from state actions or citizens suits to enforce the requirement. This is particularly true for existing IAGs, which were not developed with this provision in mind.

Each IAG includes a multi-step dispute resolution process. This process includes both informal and formal steps and involves Federal and state representatives, generally with the EPA Administrator making the final decision if agreement cannot be reached. If the S. 8 amendment were enacted, states or other parties might seek to enforce disputed requirements directly, rather than allowing disputes to be resolved through the negotiated dispute resolution process in the IAG. This possibility could effectively undercut existing IAGs, lead to increased costs, and disrupt the continuity of the Departments' progress.

Permits and Other Procedural Requirements — Sections 120(a)(1)(A)(i) and 120(a)(1)(B)(ii)

CERCLA section 121(e) provides that "no Federal, state, or local permit shall be required for the portion of any removal or remedial action conducted entirely on site." Neither Federal facilities nor private parties are required to obtain permits for on-site actions at CERCLA sites, but both must still comply with the substantive requirements of permit programs. The Congressional intent behind the CERCLA permit exemption was to allow parties to more quickly initiate and continue cleanups without the delay and expense that can sometimes occur in obtaining permits.

Throughout the implementation of CERCLA, EPA's position on the issue of permits at Federal facilities has been clear. The then director of EPA's Office of Emergency Remedial Response, William Hedeman, Jr., stated before the House Armed Services Committee in 1985:

> "We feel, consistent with our approach to private sector Superfund sites, that no permits shall be required for cleanup actions at Federal installations. Let me hasten to add that the substantive issues and concerns … would be dealt with … through the comprehensive remedial planning process undertaken by Defense and other Federal agencies. *It is the time and duplicative analyses for the actual permits that we feel can be eliminated without prejudice to the quality of cleanup.*" (emphasis added)

The S. 8 amendment states that the Departments "shall be subject to and comply with ... all other Federal, state, interstate, and local substantive and procedural requirements and other provisions of law relating to a response action or restoration action or the management of a hazardous waste, pollutant, or contaminant …" and specifically states that permit requirements are included. This provision, however, also includes the caveat that such compliance will only be "... in the same manner, and to the same extent, as any nongovernmental entity is subject to those provisions of law."

Because of this important caveat, the Departments believe that the S. 8 amendment should be read as not requiring Federal facilities to obtain permits, since private parties are currently exempt under CERCLA section 121(e). Other parties, however, could assert that Congress intended to change the status quo by listing permit requirements in the S. 8. Such an interpretation would clearly put Federal facilities on an unequal footing with private parties who would retain their permit exemption. In addition, the lack of clarity could lead to extensive litigation.

Obtaining permits for on-site cleanup would be duplicative and thereby simply add time delays and cost increases while adding little, if any, environmental benefit. Data from a variety of sources, including EPA, the General Accounting Office, states, and private industry, show that the cost and processing time for permits vary extensively. In some instances, permits must be renewed annually and thus entail annual expenditures. If remedies were subject to permit requirements, some would require multiple permits. For example, a groundwater pump-and-treat system could require air permits for venting, water permits for discharge of treated water, and hazardous waste permits for storage of used charcoal filters.

The time required for permit applications and approvals also varies, from several weeks to five years. The average time to obtain a permit is 18 months. Such a delay could jeopardize compliance with the CERCLA provision that requires that substantial continuous physical on-site remedial action be initiated at NPL sites within 15 months of the cleanup decision. Litigation could delay the process further, which would also increase costs.

In the 1997 Defense Environmental Quality (EQ) Annual Report to Congress, the Department of Defense estimates that it will spend approximately $20 million per year from FY97 to FY99 on permits and fees to acquire 13,000 permits per year to comply with the Clean Air Act (CAA), the Clean Water Act (CWA), RCRA, and the Safe Drinking Water Act (SDWA). Using the EQ

compliance figures as a guide to costs, Defense estimates that an additional 26,000 permits could be required at CERCLA sites, which could cost up to $40 million. Because of the wide variance in remedies and state permitting processes, this estimate does not include the time it would take to obtain permits. Even so, it is clear that a permit requirement could add significantly to remedy completion times. Additionally, the cost estimate does not include labor costs for preparing the permit application and supporting studies.[10]

A requirement to obtain permits also might disrupt the Department of Defense's system of cleanup priorities by delaying work on some high priority sites during the permitting process, while funds are spent on lower risk sites that may not require permits or require only very simple permits. More importantly, permit conditions imposed by state or local governments could, in some situations, override the ARARs process for determining cleanup standards for response actions.

Bar on Pre-Enforcement Review — Sections 120(a)(1)(B)(ii)(III), 120(a)(1)(D)(i), and 120(e)(7)

CERCLA section 113(h) prevents judicial review that would delay cleanup activities at facilities subject to CERCLA. The Departments are concerned that litigants will argue that the S. 8 amendment means CERCLA section 113(h) no longer applies to protect Federal facilities from lawsuits before cleanup is completed, thus treating Federal facilities differently from private parties. Dissatisfied parties could argue that section 120(e)(7) of the S. 8 amendment allows state or citizen suits to challenge Federal facility cleanups before cleanup is completed, despite the pre-enforcement review bar to such challenges established by CERCLA section 113(h). Additionally, some might argue that the section 120(a) portion of the S. 8 amendment, by referencing state "provision[s] authorizing injunctive relief" and "any process or sanction of any Federal or State court with respect to the enforcement of injunctive relief," reinforces that view.

Allowing suits before completion of the cleanup would conflict with Congress' intent in creating CERCLA section 113(h) and the success of the application of 113(h) to Federal facilities. During the debate on the Superfund Amendments and Reauthorization Act (SARA) in 1986, Senator Thurmond described the scope of CERCLA section 113(h) by stating, "The timing of the review section is intended to be comprehensive. It covers all lawsuits, under any authority, concerning the response actions that are performed…. The section also covers all issues that could be construed as a challenge to response, and limits those challenges to the opportunities specifically set forth [in section 113(h)]."

Such an interpretation of section 120(e)(7) could also nullify the existing negotiated enforcement structure of IAGs and deny the Departments the use of CERCLA section 113(h) even though the 113(h) bar would still apply to similar cleanups conducted by private parties under EPA direction. Further, the provision could be interpreted as allowing a state to enforce requirements that the state adopted after the IAG was signed, even if those requirements conflicted with the IAG. Consequently, the Departments could face disrupted schedules due to lawsuits and enforcement actions on remedy selection issues.

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10 *Refer to Attachment G for further discussion on permits.*

Such actions would slow the pace of cleanups, extend the time that the public and the environment are exposed to contaminants, and increase risk and the scope of cleanups by allowing contaminants to spread. This would require Federal facilities to spend more time and money defending cleanup decisions rather than spending resources to complete cleanups. Additional costs, depending on the terms and the size of cleanup contracts, would include the cost of keeping contractors in a standby mode, legal expenses, and overall inflation of costs due to delays.

Attorneys' Fees — Section 120(a)(1)(B)(ii)(IV)

In *Key Tronic Corporation v. United States*, 511 U.S. 809, 3821 (1994), the Supreme Court held that CERCLA does not alter the "American Rule" to allow successful private litigants the right to recover their attorneys' fees associated with litigating contribution actions against other PRPs. This finding was made in a case involving a private party attempting to recover $1.2 million in attorneys' fees from the Air Force, after the Air Force settled the underlying contribution claim. The Departments are concerned that the reference to attorneys' fees in the S. 8 amendment will lead some parties to argue that despite *Key Tronics*, attorneys' fees are recoverable from the United States. Such an argument would discriminate against the Departments, because attorneys' fees would be recoverable only from Federal agencies, not from private parties.

Impact on the Department of Defense's Nationwide Priority Program — Section 120(a)

The DERP, enacted as part of SARA, provides that the Secretary of Defense "shall carry out (in accordance with the provisions of this chapter and CERCLA) all response actions with respect to releases of hazardous substances" at facilities under the Secretary's jurisdiction (10 U.S.C. section 2701(c)). This obligates the Department of Defense to apply CERCLA to releases of hazardous substances, even at non-NPL sites. To implement this mandate, the President, pursuant to Executive Order 12580, delegated lead agency authority under CERCLA to the Secretary of Defense for cleaning up contaminated facilities under the jurisdiction, custody, or control of the Secretary.

The Department of Defense is concerned that the S. 8 amendment could diminish its lead agency authority and disrupt its relative risk priority schedule at 27,000 sites nationwide. Unlike the Department of Defense, most other parties have only local interests and do not address the national interest as a whole. States often consider the cost to private employers and the resulting risk of losing employment and tax opportunities in their states. Additionally, other parties may view the Department as having "deep pockets" of taxpayer dollars for performing expensive remedies that exceed the CERCLA standard of protecting public health, welfare, and the environment. The Department does not, however, have the resources to address every site to this extent. Many local parties will naturally think the interest of their home state is more important, without regard to the adverse effects of changing priorities in other states.

Disruption to the national priority system could increase risk to public health. More aggressive states could require faster cleanups or more funding for lower risk sites to the detriment of other

states. Localities that are more proactive or politically influential could also disturb the risk-based priority cleanup of sites within a state.

Mr. Edgar Benton, counsel for Shell Oil Company (a PRP at Rocky Mountain Arsenal that has settled its liability to the Federal government), illustrated these problems in his May 23, 1995, testimony before the House Commerce Committee on Superfund Reauthorization:

> "Federal cleanup priorities would be determined based on which state was most aggressive in seeking Federal Superfund authority and implementing costly remedies, as opposed to evaluating which cleanups made environmental and fiscal sense on a national basis. This could result in the reordering of Federal cleanup and budget priorities. One or two states that select excessively expensive cleanups could in effect lock out funds for other cleanups nationwide. Federal taxpayers would end up paying for cleanups in those few aggressive states, with absolutely no Federal check on the cost-effectiveness of the remedies selected by those states. The Federal government should retain control over how spending priorities are set among Federal facility cleanups."

The Department recognizes the concerns of the states and localities for protecting health and the environment through regulatory efforts and strives to work with the states through DSMOAs, IAGs, and RABs. The Department is concerned that the numerous state agencies and localities involved would not recognize the necessity for, and complexity of, implementing a national program and the relative risk prioritization process.

The S. 8 amendment could be argued to allow states, even where there is an ongoing CERCLA cleanup, to issue independent, unilateral administrative orders enforceable by citizens at Federal facilities to compel specific actions. The Department is concerned that states could use this authority to reorder cleanup budget priorities and schedules. A major concern is that if one state effectively uses administrative orders to reallocate Federal funding and schedules, other states may follow suit by using administrative orders themselves to compel more timely cleanup of their own sites. The overall effect could be to disrupt the Federal budget, schedule, and risk prioritization process, ultimately resulting in increased costs, slower cleanups, and loss of Departmental and Congressional control of the process.

The Department is also concerned that other parties will try to argue that the S. 8 amendment requires the Department to clean to standards beyond what is required by CERCLA. The Department believes that other parties may be less sensitive to the funding implications of requiring cleanups exceeding measures required by CERCLA at Federal facilities than it may be to the same implications at private sites. States often consider the cost to private employers, and the resulting risk of losing employment and tax opportunities in their states. The Department is concerned that states may not take such factors into account for their facilities.

The Department estimates that the monetary impact of taking the control over choice of final remedy and pace of cleanup away from the United States could be as much as $3.5 billion.[11] Assuming that remedies would require an increase in cleanup at 1 percent of the sites in the

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11 *Refer to Attachment H for examples of cost impacts of inability to select the remedy.*

program, the Department of Defense projects that potential costs could increase by almost $700 million. If remedy changes were required at 5 percent of sites, additional costs could reach $3.5 billion. Based on examples provided by the Air Force, if permit waivers could not be obtained at 1 to 5 percent of the 15,189 Defense sites that have not yet reached response complete, cleanup costs could increase by $30 million to $150 million.[12]

The current relative balance of authorities at Federal facilities encourages the agencies and states to reach consensus on disputed issues at the negotiating table rather than resorting to litigation. If the S. 8 amendment was read to upset this balance, the Department of Defense could be required to undertake activities that might not best serve the overall national interests of the environment or the taxpayer. Indeed, the history of the Superfund program shows that litigated conflict costs money. The Department fears that the S. 8 amendment would make some states less inclined to foster working relationships with the Department. Although the states and the Department now sometimes disagree on particular cleanup issues, they share ideas and concerns and negotiate to reach agreement. The Department believes in the value of balancing power and interests to promote partnerships.

THE S. 8 AMENDMENT IS NOT NEEDED

The S. 8 amendment is not needed to ensure that Federal facilities are subject to the same substantive requirements as are private parties under CERCLA. The S. 8 amendment creates the perception that the existing CERCLA waiver unfairly allows the Departments to comply with less stringent standards than do private parties. The Senate report accompanying the S. 8 amendment states that it "should finally eliminate procedural arguments and ensure that Federal agencies concentrate on cleaning up the environment and protecting human health at Federal sites on the NPL instead of trying to avoid their responsibilities." The report also states that the S. 8 amendment is designed to "eliminate this unfair advantage by requiring Federal facilities to comply … in the same manner, and to the same extent, as any nongovernmental entity." As discussed in this report, the Departments are concerned that the S.8 amendment could have unintended consequences that would impede rather than advance these stated objectives.

Currently, Federal facilities comply with state substantive cleanup requirements as required by the existing CERCLA waiver of sovereign immunity. Federal facilities are exempt from state administrative and procedural requirements during CERCLA cleanups only to the same extent as private parties. The S. 8 amendment could lead states or other parties to attempt to increase procedural requirements for Federal cleanups by arguing the S. 8 amendments require the Departments to apply for permits and comply with administrative orders, injunctions, and other requirements which would not be required of private parties because of CERCLA.

A review of the cases cited in the Senate report as a basis for the S. 8 amendment fails to support the need for an enhanced waiver of sovereign immunity. In these three cases (i.e., Colorado School of Mines, Leadville water treatment plant, and Heart of America), the United States did not rely on protection afforded by sovereign immunity. Sovereign immunity does not allow Federal facilities to avoid cleanup responsibilities that must be met by private parties. To the

12 *Refer to Attachment I for possible cost impact of inability to waive ARARs.*

contrary, the success of the Departments' programs illustrates that they accept responsibility for their sites and comply with CERCLA and 40 CFR Part 300, the provisions of the National Oil and Hazardous Substances Pollution Contingency Plan (NCP).

Colorado School of Mines, Golden, Colorado

Approximately 16 parties, including the Departments and the Bureau of Mines, contracted with the Colorado School of Mines to develop mining technology until 1985. In 1992, a city water main break flooded the site, sending mining residue into Clear Creek. EPA conducted an emergency removal action to move 22,000 cubic yards of material to a temporary stockpile to prevent further contamination of the creek. EPA issued an administrative order in 1994 requiring disposal of the stockpile materials. EPA investigated the Departments, EPA, and the Bureau of Mines regarding their possible liability at the site.

CERCLA section 107 states the legal criteria for holding potentially responsible parties (PRPs) liable for cleanup costs. EPA did not substantiate allegations by the Colorado School of Mines that the Departments contributed hazardous substances to the site. EPA, a *de minimis* contributor, and the Bureau of Mines, an alleged operator of a facility and a generator of hazardous substances at the site, subsequently reached an agreement in principle to resolve their liabilities at the site.

Neither Department invoked sovereign immunity in the case, nor would current law allow them to do so. The Departments' status was resolved through the same process that applies to any private party. Although EPA concluded that neither Department was a PRP, that decision does not prevent the Colorado School of Mines from suing either Department or any other party for contribution if it believes it has the evidence to seek contribution. The state has not brought suit but continues to pursue cost recovery against other Federal parties.

Leadville Water Treatment Plant, Leadville, Colorado

The Leadville case involves two drainage tunnels, one owned by the Bureau of Reclamation (BOR) and one owned by ASARCO, that were constructed to alleviate water flooding of underground mines. The drainage from the tunnels contains elevated levels of heavy metals from past mining operations. The drainage from the ASARCO tunnel, which was treated by ASARCO's plant, contains six times more zinc than the drainage from the BOR tunnel.

In this case, there were questions about the fairness and rationale of EPA's requiring ASARCO, a private company, to build a larger and more expensive water treatment plant to treat contaminated drainage than BOR was required to build, and about EPA's decision not to include the BOR tunnel within the California Gulch Superfund Site boundary. The Federal party, BOR, did not raise sovereign immunity arguments to affect the applicable cleanup standards. EPA's decision was based on the site-specific facts of each tunnel's discharge, not on the fact that BOR is a Federal agency.

EPA required ASARCO to build a larger treatment plant than BOR did because of higher contamination levels from ASARCO's discharge. ASARCO intended its plant to recover the zinc

from the sludge, which required increased plant holding capacity. Furthermore, EPA did not include the BOR tunnel as part of the ASARCO Superfund site because the BOR treatment plant and tunnel were already covered by a Federal Facility Compliance Agreement and a Federal court injunction entered years earlier to settle a citizens' enforcement suit under the CWA. BOR was already required to construct a treatment plant and to meet compliance requirements. Again, neither sovereign immunity nor Federal agency favoritism was a factor.

Heart of America, Hanford, Washington

In *Heart of America Northwest, et al., v. Westinghouse Hanford Company, et al.*, the plaintiffs asserted that Westinghouse had violated the CWA and state law by discharging contaminated water without a permit and that Westinghouse and the Department of Energy had violated RCRA and CERCLA by not properly reporting the release of hazardous substances. The process for addressing these releases was specifically included in the Tri-Party Agreement (TPA), which included both RCRA and CERCLA sections, signed by the Department of Energy, EPA, and the State of Washington in 1989.

The plaintiffs asserted that their claims were not covered by the CERCLA section of the TPA, and therefore, the CERCLA section 113(h) pre-enforcement review bar did not apply. The court granted Westinghouse's motion to dismiss based on CERCLA section 113(h). The court decided that CERCLA section 113(h) applied to the entire facility because the facility was regulated by an "integrated cleanup plan" under an IAG pursuant to CERCLA section 120. The court granted Westinghouse's motion because of the language in the TPA, not because of sovereign immunity issues. Indeed, the successful defense in this case was raised by a private litigant, Westinghouse, and not by the United States.

CONCLUSION

Congress created CERCLA as a program for cleaning up contaminated sites to reduce risk in a timely and cost-effective manner, unimpeded by unnecessary procedural or litigation-based delays. The Departments believe that the existing CERCLA waiver of sovereign immunity is appropriately tailored to the unique statutory purpose of CERCLA and that it already ensures that Federal facilities are subject to the same requirements as private parties. Its application is settled and well suited to the type of law that CERCLA was designed to be. The existing CERCLA waiver ensures that Federal facilities follow the same process and meet the same cleanup standards that apply to private parties under CERCLA.

The Departments believe that the S. 8 amendment is not intended to have the adverse impacts discussed in this report. They are concerned, however, that litigation based on other interpretations of the S. 8 amendment could seriously undermine cleanup progress and lead to delays in implementing CERCLA. The S. 8 amendment would not expedite CERCLA cleanups or contribute to reducing risk to human health and the environment.

The S. 8 amendment would introduce unneeded confusion and fragmentation into the cleanup process. Furthermore, attempts to construe the S. 8 amendment would embroil the Departments in protracted and contentious debates and litigation, which would add time and costs to the cleanup programs.

The S. 8 amendment could substantially change current oversight and decision-making responsibilities by overriding carefully balanced responsibilities among Federal facilities, EPA, and/or the states that have been painstakingly negotiated and are reflected in existing IAGs at NPL sites and other cleanup documents. Accordingly, the Departments believe that the S. 8 amendment could potentially create additional costs while adding little benefit to the existing CERCLA waiver.

The Departments do not believe that the S. 8 amendment is needed, a view supported within the Administration during the review of this report and expressed earlier in a letter to the Chairman of the Environment and Public Works Committee. If Congress believes some amendment to the existing CERCLA waiver is necessary, however, the Departments would like to work with the Congress to draft language that would minimize the potential for confusion and litigation, and that would adhere to the principle that Federal agencies should be treated the same as private parties.